



**INVESTIGATIVE REPORT ON JCOPE'S APPROVAL OF
GOVERNOR CUOMO'S JULY 10, 2020 OUTSIDE ACTIVITY REQUEST**
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HOGAN LOVELLS US LLP

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INTRODUCTION

The New York State Joint Commission on Public Ethics (“JCOPE”) retained Hogan Lovells US LLP (“Hogan Lovells”) to conduct an independent inquiry concerning its July 17, 2020 decision to provide conditional approval of Governor Andrew Cuomo’s July 10, 2020 written request for approval to author a book (the “July 10 Request”), including an examination of JCOPE’s processes and due diligence in connection with that decision. The book, *American Crisis: Leadership Lessons From the COVID-19 Pandemic*, was ultimately released on October 13, 2020 (the “Book”). On November 16, 2021, JCOPE Commissioners voted 12-1 to revoke JCOPE’s prior approval of the Book.¹ Nevertheless, the remit of this investigation and report is to evaluate JCOPE’s approval of the July 10 Request, in the context of the circumstances surrounding that decision, and to analyze the propriety and legality of the decision based on applicable law, regulations and JCOPE protocols.

As part of this inquiry, Hogan Lovells conducted a review of the approximately 511 emails and other documents that JCOPE collected and transmitted to Hogan Lovells in connection with JCOPE’s response to another governmental inquiry. Hogan Lovells also reviewed the approximately 166 emails and other documents cited as exhibits to JCOPE’s Notice of Substantial Basis Investigation & Hearing in the Matter of Andrew M. Cuomo (the “JCOPE Notice”). In addition, Hogan Lovells performed targeted keyword searches to identify and review additional documents produced by the Executive Chamber, Governor Andrew Cuomo, James Malatras (during the relevant period, the President of Empire State College, who helped the Governor with portions of the Book), Melissa DeRosa (during the relevant period, Secretary to the Governor), Penguin Random House (“PRH,” the publisher of the Book), and Verizon (which produced phone records for DeRosa and Stephanie Benton, executive secretary to the Governor) in response to subpoenas issued by JCOPE in 2021. Hogan Lovells also performed targeted keyword searches to identify and review additional documents produced by the New York State Assembly Judiciary Committee to JCOPE, including documents produced by Benton, Steve M. Cohen (a former aide to Governor Cuomo, working in the private sector during the relevant period), Governor Cuomo, DeRosa, Jill DesRosiers (Chief of Staff to Governor Cuomo during the relevant period), Judith Mogul (Special Counsel to Governor Cuomo during the relevant period), and Beth Garvey (Special Counsel to Governor Cuomo during the relevant period). All documents cited in this report are included in a folder that has been shared with JCOPE’s Executive Director.

In addition, Hogan Lovells conducted interviews of Michael K. Rozen (Chairman of JCOPE during the relevant period), George H. Weissman, Gary J. Lavine, James A. Yates, William P. Fisher (Commissioners during the relevant period), Monica J. Stamm, Martin L. Levine (JCOPE General Counsel and Deputy General Counsel, respectively, during the relevant period), Michael Sande, and Keith St. John (JCOPE ethics staff during the relevant period). Hogan Lovells also requested interviews with Judith Mogul and Linda Lacewell (Superintendent of the New York State Department of Financial Services during the relevant period). Through counsel, Mogul declined to participate in an interview, indicating that she did not have anything further to add

¹ Ex. 1 (<https://abc7ny.com/andrew-cuomo-book-deal-ethics-commission-albany/11242794/>).

beyond what was included in her August 19, 2020 memorandum to file. Similarly, through counsel, Lacewell declined our request for an interview but provided a summary of her recollections of her contacts with JCOPE during the Book approval process.

This report contains five main sections: (1) an executive summary of Hogan Lovells' conclusions; (2) a summary of the relevant legal background, including JCOPE's organizational structure and laws, regulations and protocols pertaining to JCOPE's approval of outside activity requests; (3) a detailed explication of Hogan Lovells' investigative findings concerning the decision to conditionally approve the July 10 Request; (4) analysis of the propriety and legality of JCOPE's approval of the July 10 Request; and (5) Hogan Lovells' conclusions and recommendations for best practices going forward.

EXECUTIVE SUMMARY

Based on our review of the JCOPE Notice, the documents cited therein, and the other documents reviewed in connection with the preparation of this report, we agree with the conclusion in the JCOPE Notice that Governor Cuomo “misused the power and authority of his office to create, market and promote for enormous personal profit a work that not only was derivative of his official duties but could only have been brought into existence and completed on schedule through the . . . assistance of a group of Executive Chamber and other State officials” On or around July 2 – only eight days before Governor Cuomo requested JCOPE approval for the Book – Governor Cuomo's literary agent represented to PRH that Governor Cuomo already wrote 70,000 words (approximately 140 pages, single-spaced) of what was expected to be an 80,000-word book. However, Governor Cuomo's July 10 Request did not indicate he already began work on the Book. On the contrary, it stated that “Governor Cuomo is seeking to author a book in the very near future.” Nor did the Governor's request acknowledge that the focus of the book would be the State's response to the COVID-19 pandemic, which was ongoing in July 2020. Instead, the July 10 Request mischaracterized the Book as a continuation of the Governor's prior memoir. The Executive Chamber then exerted pressure on JCOPE to expedite the approval of the request. When certain Commissioners expressed concerns about the request and requested a copy of Governor Cuomo's contract with PRH, Governor Cuomo's staff refused that request.

Notwithstanding the Governor's tactics, once JCOPE staff became aware that the Governor sought to write and commercialize a book about his handling of the COVID-19 pandemic *while* leading the State's response to the pandemic, they should have recognized that the request raised significant potential ethical issues. Such an arrangement created financial incentives – or, at a minimum, the appearance of such incentives – for the Governor to tailor his policies and actions to generate material for his book and/or to secure a lucrative publishing contract. Furthermore, writing and publishing a book between the summer and fall of 2020 would necessarily involve the use of state resources and personnel, as the Governor could not feasibly write a book about COVID-19 within that timeframe without involving his staff or other individuals. Indeed, the

factual record is rife with instances where Governor Cuomo met with his staff, including those involved in managing and responding to the COVID-19 pandemic, to work on his book.

Senior ethics staff at JCOPE acknowledge now that if JCOPE knew the Book would be focused on COVID-19, that should have set off alarm bells. The record is clear that JCOPE staff *did* know the Book would at least in part focus on the Governor's response to COVID-19, and that the anticipated publication date was in the fall of 2020. That should have been enough for JCOPE staff to ask for more information from Governor Cuomo about the Book, including to what extent it would be focused on COVID-19, the deadline for the manuscript, how long the manuscript had to be, and whether his staff would assist in any way in writing the book. All of this information would have been relevant to determining whether Governor Cuomo could publish a book for compensation under the nine-factor test JCOPE developed through its Advisory Opinions.

Most, if not all, of that additional information could have been obtained from the contract itself. At the request of some Commissioners, JCOPE staff asked for a copy of the publishing contract. But when the Executive Chamber refused (which itself should have been a red flag), JCOPE staff settled for a compromise where the Executive Chamber would provide JCOPE with a letter from the publisher stating that the terms of the contract were usual and customary, and would share limited terms of the contract (including the compensation terms) with Michael Rozen and Martin Levine only, on the condition that they keep the information to themselves. JCOPE staff failed to insist that they receive a copy of the contract and instead expedited the approval of the request. JCOPE staff also failed to insist that Governor Cuomo fill out the required form for outside activity requests or to otherwise require the Governor to provide all of the information required in the form, including the number of hours he expected to work on the book and an explanation of why it did not present a conflict with his official responsibilities.

In sum, JCOPE staff failed to identify the potential ethical quandary, and rather than conduct further due diligence, approved the July 10 request on July 17, 2020.

Since the approval of the July 10 Request, some Commissioners raised concerns about the delegation of power to JCOPE staff. The approval of the July 10 Request was not an improper exercise of authority by JCOPE staff. Pursuant to a resolution JCOPE passed in 2012, still operative as of July 2020, JCOPE delegated to the Executive Director the authority to issue informal letter opinions on matters that could be decided based solely on precedent. JCOPE's Executive Director and/or the staff routinely responded to and provided guidance on outside activity requests since 2012. In fact, the Commissioners rarely, if ever, voted on outside activity requests. In this case, there was JCOPE precedent on outside activity requests to write and publish books—the nine-factor test referenced above. And the letter JCOPE issued providing conditional approval of the book specified that it was issued by JCOPE staff, signifying it was not a formal advisory opinion by the Commission (which would be published on JCOPE's website and follow a different format).

One of the clear takeaways from our analysis of JCOPE's approval of the July 10 Request is that the Executive Chamber overpowered JCOPE, and JCOPE failed to assert itself as a watchdog agency against the Governor. Rather than JCOPE telling the Executive Chamber what information it needed to provide in order to obtain approval, the Executive Chamber told JCOPE what information the Governor would provide, which was not much. The Executive Chamber also successfully coerced JCOPE into expediting the approval and rushing through the process with very minimal due diligence.

It follows from these observations that any successor agency that is created to replace JCOPE should put in place mechanisms to make it more difficult for statewide elected officials to quickly push ethically questionable or problematic requests through the approval process. Hogan Lovells' recommendations in that regard are set forth in the Conclusion and Recommendations section of this report.

BACKGROUND

I. JCOPE Organizational Structure and Meeting Schedule

JCOPE consists of 14 members, eight appointed by legislative leaders (with a certain number of appointments by the majority and minority parties, as set out in further detail on JCOPE's website), and six appointed by the Governor and the Lieutenant Governor. The Commission Chairperson is selected by the Governor. Commissioners serve five-year terms. The Commission appoints the Executive Director.²

During the relevant period of June and July 2020, Michael Rozen was the Commission Chair. The other Commission members during this period were: Robert Cohen, James E. Dering, Colleen C. DiPirro, William Fisher, Daniel J. Horwitz, Marvin E. Jacob, Gary Lavine, James W. McCarthy, David J. McNamara, George Weissman and James Yates. JCOPE's staff as of June 23, 2020 was composed of:

- Monica Stamm, General Counsel
- Martin Levine, Deputy General Counsel
- Jennifer M. Bliss, Associate Counsel
- Megan Mutolo, Associate Counsel
- Walter J. McClure, Director of Communications and Public Information Officer
- Keith St. John, Deputy Counsel and Director of Ethics
- Michael Sande, Deputy Director of Ethics
- Carol Quinn, Deputy Director of Lobbying Guidance
- Lori A. Donadio, Principal Investigative Analyst
- Kelly A. McCready, Confidential Clerk

² Ex. 2 (<https://jcope.ny.gov/commissioners>).

- Gage Hodgen, Intern³

Former JCOPE Executive Director Seth Agata’s last Commission meeting was on June 25, 2019.⁴ The July 23, 2019 Commission meeting minutes indicate that the Commission’s search for a new Executive Director was ongoing, that the search committee ran advertisements and engaged in other outreach, and that JCOPE received over 100 resumes for the position.⁵ A JCOPE resolution dated April 27, 2021 states: “[O]n June 25, 2019, in the absence of an Executive director, the Commission unanimously voted to delegate the authority set forth in Resolution 12-02, to be exercised jointly by General Counsel Monica Stamm and Deputy General Counsel Martin Levine, along with Chair Michael Rozen when deemed necessary.”⁶ Although there is no indication in the June 25, 2019 meeting minutes that such an arrangement was formally authorized,⁷ the JCOPE staff and Commissioners we interviewed agreed that the Commissioners authorized Stamm and Levine to act as co-Executive Directors, and that Rozen would serve as a tie-breaker if necessary (which rarely was necessary). There was still no formally appointed Executive Director during the relevant period of June and July 2020, so Stamm and Levine were still acting as co-Executive Directors at that time.

By law, JCOPE must meet at least every two months, but it generally meets on a monthly basis. Those meetings are carried out according to a set of guidelines that closely follow the Open Meetings Law, even though Commission meetings and proceedings are not required to be public unless expressly provided otherwise by the Commission or the Lobbying Act.⁸ In 2020, JCOPE met on January 28, February 25, April 28, June 23, August 11, September 22, October 27, November 17, and December 15.⁹

II. JCOPE Has the Duty to Approve Outside Activities Based On Its Interpretation of Applicable Law

Title 19 NYCRR Part 932 contains the “regulations . . . to effectuate the conflicts of interests provisions of the Public Officers Law and to provide an approval procedure for outside activities by Policy makers, heads of State Agencies, and Statewide Elected Officials.”¹⁰

Pursuant to 19 NYCRR 932.5(a) and 19 NYCRR 932.5(b), a Statewide Elected Official (defined at Part 932.2(j) as the Governor, the Lieutenant Governor, Attorney General, and the Comptroller) who seeks “[a] job, employment (including public employment), or business venture that

³ Ex. 3 (June 23, 2020 Commission meeting minutes).

⁴ Ex. 4 (June 25, 2019 Commission meeting minutes).

⁵ Ex. 5 (July 23, 2019 Commission meeting minutes).

⁶ Ex. 6 (Staff Delegation History) at 1.

⁷ Ex. 4 (June 25, 2019 Commission meeting minutes).

⁸ Ex. 7 (<https://jcope.ny.gov/jcope-meeting-guidelines>).

⁹ Ex. 8 (<https://jcope.ny.gov/commission-meeting-agendas-and-minutes>).

¹⁰ Ex. 9 (19 NYCRR Part 932).

generates, or is expected to generate, more than \$5,000 in Compensation annually” must obtain approval from JCOPE prior to engaging in those outside activities. Officers and employees of New York State agencies, and members, directors, and employees of New York State public authorities and public benefit corporations, are also subject to JCOPE’s regulations.¹¹

A Statewide Elected Official who requires JCOPE approval pursuant to Part 932.5(b) must submit a completed “Outside Activity Approval Form,” which is available on JCOPE’s website. 19 NYCRR 932.6(c). The Outside Activity Approval Form requires the submission of various specific pieces of information concerning the proposed outside activity:

- a. The number of hours of work per week, as well as the times and days when the work will be performed;
- b. Whether the outside activity involves a person or entity that does business with, seeks to do business with, has recently done business with, applied for or receives funds from, or is regulated by, your agency or any other State agency;
- c. An explanation as to why the outside activity does not present a conflict with your State job responsibilities.¹²

According to Part 932.6(d), with respect to any outside activity request that requires JCOPE approval, “the Commission shall make its determination based on its interpretation of whether the proposed outside activity is in accordance with the applicable provisions of the Public Officers Law, Commission Advisory Opinions, regulations, and policies.” Further, “[t]he Commission may require additional information as it deems appropriate.”

The “General Standard for All Persons Subject to Public Officers Law §74” is that “[n]o individual who is subject to Public Officers Law §74, shall engage in any outside activity which interferes or substantially conflicts with the proper and effective discharge of such individual’s official State duties or responsibilities.” 19 NYCRR Part 932.3.

Executive Law § 94(16) and Legislative Law § 1-d(f) give the Commission the power and duty to render advisory opinions concerning the legal requirements of the public officers law:¹³

Upon written request from any person who is subject to the jurisdiction of the commission and the requirements of sections seventy-three, seventy-three-a or seventy-four of the public officers law, other than members of the legislature, candidates for member of the legislature and employees of the legislature, the commission shall render written advisory opinions on the requirements of said provisions. An opinion rendered by the commission, until and unless amended or revoked, shall be binding on the commission in any subsequent

¹¹ Ex. 10 (<https://jcope.ny.gov/outside-activities>).

¹² Ex. 11 (JCOPE Outside Activity Approval Form).

¹³ Ex. 12 (Executive Law § 94); Ex. 13 (Legislative Law Article 1-a).

proceeding concerning the person who requested the opinion and who acted in good faith, unless material facts were omitted or misstated by the person in the request for an opinion. Such opinion may also be relied upon by such person, and may be introduced and shall be a defense, in any criminal or civil action. Such requests shall be confidential but the commission may publish such opinions provided that the name of the requesting person and other identifying details shall not be included in the publication.¹⁴

In addition to any other powers and duties provided by section ninety-four of the executive law, the commission shall, with respect to its lobbying-related functions only, have the power and duty to: issue advisory opinions to those under its jurisdiction. Such advisory opinions, which shall be published and made available to the public, shall not be binding upon such commission except with respect to the person to whom such opinion is rendered, provided, however, that a subsequent modification by such commission of such an advisory opinion shall operate prospectively only[.]¹⁵

Executive Law § 94(17) broadly states that “the commission shall have the power and duty to . . . [a]dminister and enforce all the provisions of this section.”¹⁶

Through Advisory Opinions, the Commission has developed a nine-factor test that must be satisfied in order for a current State officer or employee to receive royalties from a sale of a book:

Public Officers Law §§ 73 and 74 do not prohibit a current State officer or employee from receiving royalties from a sale of a book, provided a nine-part test is satisfied[:]

- (1) the book was written on his own time and not on State time;
- (2) no State property, personnel or other resources were utilized;
- (3) the subject matter was sufficiently unrelated to his job responsibilities so that authorship or the advice or material provided in the book could not be viewed as part of his job;
- (4) the book was not written for an organization or audience which is regulated by, regularly negotiates with, or has contracts with the individual’s employing agency;
- (5) the book does not identify the author as a State employee (although a biography may, among other items, list such credential);
- (6) the State agency where the author is employed did not advertise, otherwise promote or endorse the book;
- (7) the author does not advertise, otherwise promote or endorse the book when he is performing his State duties, whether involving training or otherwise;

¹⁴ Ex. 12 (Executive Law § 94(16)).

¹⁵ Ex. 13 (Legislative Law § 1-d(f)).

¹⁶ Ex. 12 (Executive Law § 94(17)).

(8) the State agency does not use the book or make it available as part of any of its training programs; and

(9) the book contains a disclaimer that the opinions and statements contained in the book are those of the author only and do not represent the opinion or interest of the employee's State agency or any other State agency of New York.¹⁷

As set forth above, 19 NYCRR Part 932 gives the Commission the power and duty to approve outside activities, and the Commission is required to make those determinations based on its interpretation of whether the proposed outside activity complies with the applicable law, including JCOPE's own Advisory Opinions. Executive Law § 94(6) states that "the commission shall have power to act by majority vote of the total number of members of the commission without vacancy." Executive Law § 94 specifically requires a majority vote for the appointment and removal of the Executive Director, the commencement of a substantial basis investigation, and to refer a matter to a prosecutor for further investigation, but does not explicitly address whether the approval of an outside activity request requires a vote.

III. JCOPE Passed a Resolution In 2012 Delegating Authority to the Executive Director

Pursuant to Executive Law § 94(9)(a), JCOPE is authorized to "delegate authority to the executive director to act in the name of the commission between meetings of the commission provided such delegation is in writing, the specific powers to be delegated are enumerated, and the commission shall not delegate any decisions specified in this section that require a vote of the commission."

On February 28, 2012, JCOPE – acting pursuant to its delegation authorities under Executive Law § 94(9)(a) – passed Resolution 12-02 "delegat[ing] authority to the Executive Director of [the] Commission the specific powers and duties enumerated below." Paragraph 16 of Resolution 12-02 stated: "Pursuant to Executive Law §94(16) and Legislative Law §1-d(f), to issue informal letter opinions when the response to an inquiry is based solely on Commission precedent."¹⁸ This resolution superseded the December 20, 2011 resolution (Resolution 11-01), which delegated the Commission's authority under "section 94(16) of the Executive Law and section 1-d of the Legislative Law to render advisory opinions to persons subject to the jurisdiction of the Commission." Resolution 12-02 deleted prior language in Resolution 11-01 delegating authority to the Executive Director to "render advisory opinions," and instead only permitted the Executive Director to issue "informal letter opinions."¹⁹

In Commission meetings subsequent to the approval of the July 10 Request, Commissioners raised questions about the scope of the delegation of authority, and Stamm explained her understanding of how the delegation of authority had been implemented since 2012. During the November 17, 2020 Commission Meeting, Commissioner Lavine sought clarity on JCOPE's practices with

¹⁷ Ex. 14 (JCOPE 2019 Ethics Guide).

¹⁸ See Ex. 6 (JCOPE Resolution 12-02) at ¶ 16.

¹⁹ See *id.* (JCOPE Resolution 11-01).

respect to Resolution 12-02, asking with respect to “outside activity requests that [are] made by a constitutional officer, which is to say one of the four statewide elected officers or an agency head of a department, are those being granted without a vote of the Commission?” Stamm responded:

That is correct. The practice of staff, under the delegation as it has been interpreted by this Commission since 2012, and the delegation is nearly identical to the delegation in 2007, and that was the practice of the Commission on Public Integrity, and it is my understanding that this was also the practice under the State Ethics Commission, for staff to handle outside activity requests as part of the informal guidance that was delegated to staff, and no vote of the Commission were required. That has been the practice for my entire experience at JCOPE.

Commissioner Lavine then asked whether it is “staff’s position that approvals for outside income activity can be disposed of informally by staff the same way that a generic outside activity request can be disposed of? In other words, the Commission is not involved.” Stamm responded:

Yes, it is staff’s position, and it’s also been the position of all of the prior Commissioners and prior staff of our agency and our predecessors. There has been no distinction made between agency heads and constitutional officers and other policy makers, and the language in the regs doesn’t really make the distinction between them. Both are subject to Commission approval. The only distinction is that you need also the approval of your appointing authority. And so, for the case of the constitutional officers and the agency heads, since they are the heads, the Commission is the only entity that approves those activities, but this remains within the discretion of the Commission. The Commission can change the delegation, but it has always been the interpretation of the delegation to include that authority as part of the delegation of informal guidance to staff.²⁰

The Commission also discussed Resolution 12-02 during the October 27, 2020 meeting:

Commissioner Lavine asked if the provision in 19 NYCRR Part 932.5, which addresses approval of outside activities for constitutional officers and state agency heads, is being rendered by staff without a vote of the Commission. General Counsel Stamm stated that throughout the existence of JCOPE, and its predecessor agencies, the approval of outside activities has been delegated to staff and no vote of the Commission is required. She further stated that the Commission can delegate to staff its statutory authority over the day-to-day operations of the agency with the exception of those provisions of the statute that explicitly require a vote of the Commission. Commissioner Lavine stated that it is a bad practice for staff to render certain outside activity approvals.²¹

²⁰ Ex. 15 (November 17, 2020 Commission meeting transcript) at 10-12.

²¹ Ex. 16 (October 27, 2020 Commission meeting minutes) at 5-6.

Stamm also stated that “[u]nder the delegation [of authority], if there is a novel question, staff brings the matter to the Commission for a vote, but if there is already precedent, staff can quickly respond to the request,” and that “[i]t also has been the long-standing practice of staff to advise the Commission of high-profile guidance requests.”²²

None of the JCOPE staff or Commissioners we interviewed contradicted Stamm’s recollection that outside activity requests that could be decided based on precedent were decided by the Executive Director in conjunction with JCOPE staff following the 2012 delegation of authority. In fact, no one we interviewed could recall any specific outside activity request by a statewide elected official that the full Commission voted on.

INVESTIGATION FINDINGS

I. Early June – July 10, 2020: Governor Cuomo, With Assistance From Other State Employees, Drafted Substantial Portions of the Book Before Requesting JCOPE Approval

On March 19, 2020, an editor from PRH reached out – apparently unprompted – to Governor Cuomo’s literary agent, Robert Barnett, expressing admiration for Governor Cuomo’s handling of COVID-19 and expressing PRH’s interest in publishing a book by Governor Cuomo on that topic.²³ By early June, Governor Cuomo and his Executive Chamber staff began work on the Book.²⁴ Governor Cuomo’s work on the Book coincided with the first phase of the reopening of New York City on June 8, 2020.²⁵

On July 1, 2020, Barnett arranged a call with a PRH executive.²⁶ The next day, a PRH executive reported to others at PRH that Barnett informed him that Governor Cuomo would offer a book for publication and already wrote 70,000 words of what was expected to be an 80,000-word book.²⁷

II. July 10-17, 2020: JCOPE Reviewed and Approved the July 10 Request

July 9-10

On the evening of July 9, Special Counsel to Governor Cuomo, Judy Mogul, emailed Stamm requesting a call with her and Julia Pinover Kupiec, Special Counsel and Chamber Ethics Officer, that night. An hour later, Mogul suggested the call be scheduled for “as early as possible tomorrow am.” Stamm responded before 8:00 a.m. on July 10 that she would be free until 11:00 a.m., and

²² *Id.* at 6.

²³ Ex. 17 (PRH_JCOPE_00044517).

²⁴ *See, e.g.*, Ex. 18 (GAMC00000003) at GAMC00000015-GAMC00000017.

²⁵ Ex. 19 (<https://www.governor.ny.gov/news/governor-cuomo-announces-new-york-city-enter-phase-1-reopening-june-8-and-five-regions-enter>).

²⁶ Ex. 20 (PRH_JCOPE_00017569).

²⁷ Ex. 21 (PRH_JCOPE_00002346).

Mogul responded one minute later asking to schedule the call for 8:00 a.m.²⁸ According to Stamm's notes of the call, Mogul informed Stamm that Governor Cuomo wanted approval to publish a book (which would be similar to the book he published in 2014), and asked for the review to be expedited. Stamm's notes also indicate that Mogul stated that Governor Cuomo had not yet signed the publishing contract, but was considering a few possible publishers including PRH and others. They also discussed that Governor Cuomo's staff would send JCOPE a letter requesting approval of the Book.²⁹ Mogul's August 19, 2020 memorandum to file references this call with Stamm as follows:

I spoke first with Monica Stamm, who referred me to Martin Levine who explained to me that JCOPE staff had authority to decide all outside activity approval requests. I explained in broad terms that the Governor was writing a new memoir, with a focus on the COVID-19 crisis, and that we wanted to make sure he had outside activity approval prior to negotiating a contract with a publisher.³⁰

At 8:32 a.m., presumably shortly after Stamm's call with Mogul, Stamm emailed Levine, Keith St. John (JCOPE Deputy Counsel / Director of Ethics) and Michael Sande (JCOPE Deputy Director of Ethics Guidance) with the subject: "Call as early as possible this am? 9?" The body of the email states: "Governor, has another book deal in the works. Let me know when you can talk." Stamm's email attached a copy of the December 28, 2012 letter from JCOPE to Governor Cuomo's staff authorizing his prior book.³¹

About an hour later, Mogul emailed Stamm a document identifying two potential publishers, PRH and MacMillan/Henry Holt & Company, and provided information about the lobbying and state contracting activities of both companies and their subsidiaries and affiliates. Mogul told Stamm: "I appreciate your working to expedite this" and "[w]e should be able to get you the letter shortly."³²

Later that morning, at 10:45 a.m., a PRH executive informed his colleagues at PRH that "Cuomo will have to do a confidential filing today to state that he is planning on writing a book and to vouch that the publisher has no conflict of interest with the state—but this will be pro forma and non-public so Bob [Barnett] says it will neither impact nor be of concern to the chosen publisher."³³ These emails suggest that Governor Cuomo treated the JCOPE approval process as an afterthought, and that he or his staff communicated to his literary agent that the JCOPE approval process was essentially a formality that would be completed quickly so as to not impact the publisher.

²⁸ Ex. 22 (NYJCOPE00001325).

²⁹ Ex. 23 (NYJCOPE00001373).

³⁰ Ex. 24 (August 19, 2020 Mogul memorandum).

³¹ Ex. 25 (NYJCOPE00001314); Ex. 26 (NYJCOPE00001315).

³² Ex. 27 (OGNYS-JCOPE-COVID-00024070).

³³ Ex. 28 (PRH_JCOPE_00017638).

In the early afternoon, Stamm exchanged text messages with Levine regarding her recusal from deciding on whether to approve the Book.³⁴ According to Levine’s handwritten notes entitled “Analysis of Potential Book Deal,” Stamm recused herself out of an abundance of caution because her sister’s husband was a senior editor at PRH.³⁵

At 1:00 p.m., Mogul submitted to JCOPE a written request pursuant to Part 932 for approval of the Book. Her email to Levine states: “[P]lease find attached a letter requesting outside activity approval for the Governor to author a memoir. . . . Please let me know what else we can do to assist you in your review and consideration of this request, and thank you very much for your expedited attention to this matter.” The attached letter request stated that “Governor Cuomo is seeking to author a book in the very near future, which will be a memoir of his professional and personal life since his last book, published in October 2014,” and that “this book will be a continuation of his last book . . . which was approved by JCOPE on December 28, 2012.”³⁶ These statements mischaracterized the subject matter of the Book by failing to disclose that it would focus on Governor Cuomo’s response to the COVID-19 pandemic, and also created the false impression that Governor Cuomo had not started authoring the Book. The letter also stated that Governor Cuomo “will select” a publisher, which was true from a literal standpoint, but misleadingly suggested that the decision had not yet been made, when in reality negotiations with PRH were well-underway, and PRH’s internal emails later that day reflect their understanding that they were selected as the publisher.³⁷ In its conclusion, the letter stated: “If required, the Governor will submit a completed outside activity approval form once he receives JCOPE approval to author this memoir and has finalized arrangements with a specific publisher.”³⁸ JCOPE never required an outside activity form, and, accordingly, the Governor never completed one.

Later that afternoon, St. John emailed Levine and other JCOPE staff that Governor Cuomo was on the radio discussing a book he would like to write about New York’s experience responding to the COVID-19 pandemic. In response, Jennifer Bliss (JCOPE Associate Counsel) asked “do we think that goes against the factor regarding promoting the book during the course of his state duties...?,” referring to one of the nine factors JCOPE set out in its Advisory Opinions. St. John replied: “It may make the delineation between material in the book that is unrelated AND related to his job responsibilities a bit murkier—though one of our conditions in approving the [Outside Activity] would presumably be the absence of any material or advice that could reasonably be viewed as part of his official duties as the state’s chief executive.” Levine then responded: “Can anyone talk for five min? Just want to give you an update.”³⁹

³⁴ Ex. 29 (NYJCOPE00001337).

³⁵ Ex. 30 (NYJCOPE00001175).

³⁶ Ex. 31 (OGNYS-JCOPE-COVID-00024076-24084).

³⁷ Ex. 28 (PRH_JCOPE_00017638).

³⁸ Ex. 31 (OGNYS-JCOPE-COVID-00024076-24084).

³⁹ Ex. 32 (NYJCOPE00000201).

Also in the late afternoon, Walter McClure (JCOPE Director of Communications and Public Information Officer) texted Stamm: “Is this fire drill anything I need to be concerned about? It’s obviously continued through the day, which is why I ask.” Stamm responded: “Yes. Govr working on new book deal.”⁴⁰

Just after 6:00 p.m., a PRH executive informed his colleagues: “Confidential and not official until Monday, but per a final call between Gina [Centrello of PRH] and Bob [Barnett] we have prevailed in the auction at \$5.2M base with refresher advances as outlined earlier. Bob still needs to speak with his client, but from his perspective we will be the publishers of the book.”⁴¹

Later that night, Martin Levine sent Bliss, St. John and Sande a draft email describing the Governor’s request to be sent to JCOPE’s Chair and Commissioners.⁴²

July 11

On Saturday, July 11, 2020, at 9:37 a.m., Levine sent the email he drafted the prior evening to JCOPE’s Chair and Commissioners. The email began as follows:

We were contacted by the Executive Chamber yesterday regarding a potential outside activity for Governor Cuomo. As represented to us, the Governor would author a memoir that is a continuation of his 2014 book “All Things Possible”, to potentially be published by Penguin Random House’s Crown Publishing Group (Penguin Random House is a division of the German conglomerate Bertelsmann SE & Co. KGaA). Staff has been asked to provide an approval for the Governor enter into these contract negotiations. Any such approval would be conditional, based on the final terms of the agreement.

Levine’s email proceeded to list the nine factors state officials must comply with “to be able to publish a book for compensation.” He called attention to the third of these factors—“the subject matter must be sufficiently unrelated to his job responsibilities so that authorship or the advice or material provided in the book cannot be viewed as part of his job”—by including an asterisk with the following note: “[t]he Commission’s previous evaluation of a book contract in 2012 noted that ‘the presence in the book of material or knowledge acquired by the Governor in the course of performing his official responsibilities’ is consistent with this third factor.” The remainder of Levine’s email stated as follows:

The Chamber has represented to us that the Governor’s planned activity allows him to stay within the bounds created by the nine factors.

⁴⁰ Ex. 33 (NYJCOPE00001326).

⁴¹ Ex. 28 (PRH_JCOPE_00017638).

⁴² Ex. 34 (NYJCOPE00000049).

Additionally, we have looked extensively into Penguin Random House's corporate ownership structure and affiliations, and find that neither Penguin Random House nor any of its parent, subsidiary, or affiliate firms or publishing imprints have current contracts with the state. Additionally, none of them are (or have been) registered as lobbyists or file as clients of lobbyists.

Based on staff's analysis, we do not see a reason to deny the request (again, any approval would be conditional, subject to the final terms), and are inclined to communicate this to the Chamber by close of business Monday. Please let me know if you have concerns or if there are issues you want us to address, or would otherwise like to discuss.

Please note, Monica is recused on this matter.⁴³

Later that day, Commissioner George Weissman responded to Levine's email, copying Gary Lavine and Marvin Jacob, raising a few follow-up questions concerning potential conflicts of interest with respect to the publishers and asking for a copy of the contract executed for Governor Cuomo's prior book.⁴⁴ Levine and Stamm then exchanged text messages concerning Weissman's request for the contract for Governor Cuomo's prior book; Stamm advised Levine to tell Weissman that he would ask others on the JCOPE staff whether they have a copy of it on Monday.⁴⁵ Stamm asked "[a]nyone else raising issues?," to which Levine responded "[n]ot so far" and Stamm replied, "Good. It's usually just gw [George Weissman] and Yates. GL [Gary Lavine] wont have an issue."⁴⁶

That evening, Commissioner James Dering responded to Levine's email from that morning, stating: "I don't have any concerns. Thanks."⁴⁷

July 12

Levine recalled receiving a telephone call from Mogul on Sunday, July 12, 2020, in response to his request for information regarding the publishing contract for the Book on or around July 10. According to Levine, Mogul told Levine that Linda Lacewell – then the Superintendent of the Department of Financial Services – wanted to speak with him. According to Levine, Mogul conferenced Lacewell into a call with Mogul and Levine, during which Lacewell tried to convince Levine to back down on his request for the publishing contract. Levine also recalled Mogul or Lacewell offering to provide a letter from the publisher stating that the amount of compensation Governor Cuomo would be receiving was "usual and customary." Levine recalled stating that

⁴³ Ex. 35 (NYJCOPE00001354).

⁴⁴ Ex. 36 (NYJCOPE00000895).

⁴⁵ Ex. 37 (NYJCOPE00001340).

⁴⁶ Ex. 38 (NYJCOPE00001341); Ex. 39 (NYJCOPE00001342).

⁴⁷ Ex. 40 (NYJCOPE00001281).

such a letter would be helpful but that he needed other information as well, including the amount of compensation and the Governor's promotional obligations under the contract.

Through counsel, Lacewell provided Hogan Lovells with the following summary of her recollection of her telephone call with Levine in July 2020:

Linda Lacewell recalls being on a call with Judy Mogul and an individual from JCOPE in July 2020. Ms. Lacewell recalls that Monica Stamm of JCOPE had recused herself from the approval process because her family had a relationship with one of the potential publishers of the book. The person at JCOPE who was dealing with the approval process in her absence was Martin Levine, who was second-in-command to Ms. Stamm. Mr. Levine had not been involved in the approval process for the Governor's first book, so Ms. Lacewell was involved in the call to explain how the JCOPE approval process for the Governor's first book had worked.

Ms. Lacewell recalls that there was a discussion on the call of what the compensation would be for the book. Ms. Lacewell does not believe that she or Ms. Mogul knew the exact number of the payment the Governor would receive for the book at the time of the call. Ms. Lacewell recalls that she and/or Ms. Mogul pointed out that the amount of payment was not relevant to the legal analysis, and thus questioned why JCOPE needed this information. Ms. Mogul shared with Mr. Levine that there was some reluctance within the Governor's Office to sharing the number with JCOPE because it was perceived that JCOPE was a highly politicized organization and that JCOPE members often leaked information to the press for political purposes. Ms. Lacewell recalls that Mr. Levine commented that he assumed the number would be a "big number." Ms. Lacewell does not believe that any specific number of potential compensation was discussed on the call.

July 13

On Monday, July 13, 2020, Levine texted Stamm asking her to call him once she is online, and stating "GW [George Weissman] is throwing bombs." They spoke at 9:30 a.m.⁴⁸

At 12:44 p.m., Levine sent an email to the Commissioners on behalf of Chairman Rozen:

I understand that some of you have asked staff for documents and other information related to the Governor's proposed book deal, though no one has reached out to me or responded to the group. The Governor's office provided certain representations, and staff have not identified anything to contradict these or to otherwise suggest a conflict with the publisher. Additionally, according to the Governor's Office, the publisher has indicated that the financial arrangements are "usual and customary" for the industry. The ethics staff has

⁴⁸ Ex. 41 (NYJCOPE00001327).

evaluated these facts like any other outside activity request, and are prepared to approve it. In the absence of an Executive Director, Martin and I have discussed this, and I agree that the request should be approved. If Commissioners have concerns about the Governor's request, please let me know, so I can consider them. Otherwise, staff will send the approval at the end of the day. As you recall, we discussed a few months ago that day-to-day advice and guidance (including outside activity requests) should continue to be delegated to staff; consistent with that discussion, the approval letter will expressly state that is a staff determination. If the Commission would like to revisit the delegation of authority, we can discuss it at a future meeting.⁴⁹

About an hour later, Weissman responded to the 12:44 p.m. email, directing his response to Rozen and copying Commissioners Lavine, Jacob, McNamara, Yates and McCarthy (leaving Levine off the email). Referring to JCOPE's approval of Governor Cuomo's prior book deal, he wrote, "whatever Commission staff did or did not do resulted in the Commission being skewered publicly for the transaction." He then reiterated his request for the contract executed in connection with Governor Cuomo's prior book deal, and requested additional information:

I have no problem with any public officer or employee supplementing their income properly. However, when a statewide elected official is involved in such a request it is incumbent upon JCOPE to recognize its actions will be scrutinized. So, my questions to Martin below still stand:

-Please have someone find and copy the original book contract. I recognize this request may take several days.

-Upon receipt of the new book contract please forward a copy to me.

-Why did Monica recuse herself from this review?

-Who and what law firm is representing the Governor in this new book transaction.

These are simple questions that are part of any conflicts check; when answered and reviewed should provide Commissioners that are interested with confidence that JCOPE has done its job.⁵⁰

At 2:10 p.m., Yates responded to Weissman's email, questioning why the decision on Governor Cuomo's book had to be rushed:

⁴⁹ Ex. 42 (NYJCOPE00000877).

⁵⁰ Ex. 43 (NYJCOPE00001361).

I don't understand why these things always seem to be on a rush basis. The Governor must have been contemplating and negotiating this deal for a period of time. Without opining on whether staff approval is right or wrong, I feel we are being 'jammed' on something that might (if George [Weissman] is right) require some thought and discussion.⁵¹

Later that afternoon, Rozen forwarded Weissman's email that included several requests for information to Levine and asked how quickly the requested information could be provided.⁵²

Meanwhile, at 4:13 p.m., Commissioner DiPirro responded to Levine's 12:44 p.m. email stating, "I agree -we should approve" Governor Cuomo's Book.⁵³

Shortly after 5:00 p.m., Levine texted Stamm, "[f]irst text from Judy is in," and asked, "[c]an I say random house or 'a publisher' in Mike's email to full commission?" Stamm responded: "I'd prefer you just say a publisher but if you really want to say the publisher that's fine."⁵⁴

Just before 5:30 p.m., Stamm emailed Levine and St. John: "Based on our discussions on Friday, July 10, 2020, I have determined, out of an abundance of caution, to recuse myself from the Governor's outside activity request based on the potential perception of a conflict of interest with Penguin Random House."⁵⁵

Just before 6:00 p.m., Levine sent a draft email to Rozen, for Rozen to send to the Commissioners in response to Weissman's concerns and requests for additional information:

Thank you for your questions. I have brought the full commission in so that everyone has the benefit of this response. I don't think the information you've asked for in the email below is relevant, and it is beyond what staff and I think is necessary to be able to evaluate the publisher for potential conflicts. Based on what was provided by the Chamber, and the additional due diligence that the ethics staff performed, I have no reason to doubt staff's conclusion. Finally, since staff's email on Saturday morning, the only other feedback I've gotten from commissioners has been to support approval. Therefore, I have directed Martin to convey the staff's approval of the outside activity request to the Governor's office. As an aside, Monica has authorized me to tell you that she recused herself from this matter out of an abundance of caution, based on the potential for a perceived conflict with a publisher.⁵⁶

⁵¹ Ex. 44 (NYJCOPE00001369).

⁵² Ex. 45 (NYJCOPE00000669).

⁵³ Ex. 46 (NYJCOPE00001299).

⁵⁴ Ex. 47 (NYJCOPE00001328).

⁵⁵ Ex. 48 (NYJCOPE00001323).

⁵⁶ Ex. 49 (NYJCOPE00000905).

About an hour later, Stamm texted Levine: “Making progress?” Levine responded: “I think so. He’s about to shut it down and tell me to go,” referring to Chairman Rozen shutting down certain Commissioners’ requests for additional information. After Stamm responded “[g]ood,” Levine added, “[h]e is going to cc full commission on his response to them,” to which Stamm responded, “Good. Takes this off you.” Levine replied, “Going to be messy but yes,” and Stamm responded, “That was inevitable.”⁵⁷

At 8:10 p.m., Rozen revised Levine’s draft email, and sent the revised version to all Commissioners except DiPirro, to whom Levine subsequently forwarded the email.⁵⁸ Rozen’s email stated as follows:

Thanks for your emails. I have added the full Commission to this thread so that everyone has the benefit of this correspondence.

At the outset, let’s acknowledge that the Commission long ago delegated decisionmaking on this kind of matter to staff. Based on information provided by the Chamber, and the additional due diligence undertaken by ethics staff, I have no reason to doubt staff’s conclusion that the Governor entering into negotiations for a book deal with this publisher is appropriate. Other than your emails, the other feedback I’ve received from Commissioners has been in support of approval. Tonight, I have directed Martin to convey the staff’s approval for the Governor to enter into negotiations for a book contract.

Although not relevant to consideration of the request, Monica has authorized me to inform you that she recused from this matter out of an abundance of caution, based on the potential for a perceived conflict with a publisher.

As always, I’m happy to discuss this decision if anyone should so desire.⁵⁹

Earlier that evening, DeRosa exchanged emails with Barnett and PRH concerning the logistics for securely transmitting the draft manuscript for the Book to PRH. During that exchange, a PRH executive told DeRosa: “We are incredibly excited to be working with you in the coming days and weeks and truly honored to have the opportunity to publish Governor Cuomo’s book.”⁶⁰

At 8:44 p.m., Mogul emailed Levine with the subject line “Outside activity”: “Martin – this will confirm our conversation a few minutes ago in which you confirmed JCOPE approval for the Governor to negotiate with Penguin Random House/Crown as proposed, and that he will receive

⁵⁷ Ex. 50 (NYJCOPE00001329); Ex. 51 (NYJCOPE00001330).

⁵⁸ Ex. 52 (NYJCOPE00001371).

⁵⁹ *Id.*

⁶⁰ Ex. 53 (PRH_JCOPE_00017647–48).

approval of the full outside activity once the additional information we discussed is provided.”⁶¹ Mogul’s August 19, 2020 memorandum to file provides further details on her call with Levine:

On Monday, July 13, Mr. Levine and I had a telephone conversation in which he conveyed that the Staff had granted provisional approval of the outside activity request, such that the Governor could negotiate a contract with Penguin Random House/Crown, but that the Staff would require additional information concerning the terms of the contract before providing final approval. I confirmed that conversation in an email with Mr. Levine on July 13. The additional information we agreed to provide to the Staff included any obligations the Governor would assume beyond delivery of a manuscript, and a representation from the publisher that the terms were usual and customary.⁶²

In sum, after Mogul and/or Lacewell resisted Levine’s original request for the contract on July 12, Mogul and/or Lacewell suggested that JCOPE instead accept a representation that the terms of the contract were usual and customary. At some point around this time, at Rozen’s suggestion, Levine offered a compromise to Mogul: Mogul could simply pass along additional information concerning the contract (including the compensation terms) to Levine and Rozen, and they would keep the information to themselves. Rozen and Levine believed this compromise was acceptable because decision-making had been delegated to staff, and thus the Commissioners did not need the information in order to make a decision, and in any event, certain of the Commissioners had a propensity for leaking information like this to the media, and they would eventually receive the information anyway. By July 13, Mogul agreed to Levine’s demand to provide additional information concerning the contract prior to JCOPE providing conditional approval of the July 10 Request, subject to the agreed compromise that Levine and Rozen would not disclose the additional information to the rest of the Commission.

Later on July 13, Mogul or one of her affiliates presumably informed Barnett that Mogul agreed to provide JCOPE a representation from PRH that the terms of Governor Cuomo’s contract were usual and customary, because at 9:44 p.m., Barnett emailed a PRH executive: “Here is the language we need. It turns out that sooner is better if you can.” The draft language Barnett provided was: “This will confirm that, based on our extensive experience in the industry, the terms of the proposed contract between Penguin Random House and Governor Cuomo are usual and customary based on the surrounding facts and circumstances.” The PRH executive responded: “I will have it back to you on letterhead tomorrow morning.”⁶³

July 14

On July 14, at 9:16 AM, Levine responded to Mogul’s 8:44 p.m. email from the prior night regarding “Outside activity,” where she sought to confirm what they discussed that night: “Just to

⁶¹ Ex. 54 (OGNYS-JCOPE-COVID-00024438).

⁶² Ex. 24 (August 19, 2020 Mogul memorandum).

⁶³ Ex. 55 (PRH_JCOPE_00017651).

clarify, the approval to negotiate with the publisher is from JCOPE staff. And, as you said, final approval of the outside activity will be sent consistent with our discussions.”⁶⁴

Also that morning, Weissman responded to Rozen’s 8:10 p.m. email from the prior night:

Much like Commissioner Yates I am concerned regarding any request that requires an immediate response, depending on the circumstances, leaving staff and/or Commissioners with less time than may be needed to adequately review a matter.

However, at the outset the issue you raise regarding delegation has not been questioned. Clearly a delegation to staff has never precluded one or more Commissioners from obtaining information relating to a matter. In many instances previous Executive Directors have sought informal guidance from one or more Commissioners regarding a matter delegated to staff or, as the matter being discussed, put Commissioners on notice, which included providing information as requested.

The request now being made for the third time pertains to information, some of which the Commission already has in its possession and other information that will come into its possession during the course of this review.⁶⁵

Weissman proceeded to cite the Commission’s regulations requiring Commission approval of statewide elected officials’ outside activity requests (Title 19 NYCRR Part 932), as well as the regulations requiring submission of an Outside Activity Approval Form (19 NYCRR Part 932.6(c)), and asked Rozen to “[p]lease have staff forward a copy of the outside Activity Approval Form.” Weissman also made the following requests, stating that “[t]he information requested is clearly within the purview of any Commissioner’s right to receive and review” and that “[i]f the information requested above is not going to be provided on a timely basis please provide a legal explanation for the decision”:

-Please have someone find and copy the original book contract. I recognize this request may take several days.

-Upon receipt of the new book contract please forward a copy.

-Who and what law firm is representing the requestor in this transaction.⁶⁶

Later that morning, Barnett followed up with PRH on his request for a letter to be provided to JCOPE stating that the terms of the proposed contract between PRH and Governor Cuomo are usual and customary. Barnett noted that “Melissa [DeRosa] says it will be very helpful to her to

⁶⁴ Ex. 54 (OGNYS-JCOPE-COVID-00024438).

⁶⁵ Ex. 56 (NYJCOPE00001310).

⁶⁶ *Id.*

have it today. She can then present it to the officials. So, thank you for this.” PRH in turn sent Barnett a file labeled “Publisher Letter for Governor Cuomo_Signed,” a signed letter from PRH containing the exact language Barnett requested in his email the night before.⁶⁷ Barnett presumably forwarded the letter to DeRosa, who then sent it to Mogul and Lacewell.⁶⁸

That night, Barnett responded to PRH’s July 13 email concerning the logistics for transmitting the manuscript for the Book stating that “she,” referring to DeRosa, “is going to get back to you tonight. They should have material in your hands tomorrow. I think I have convinced her to convince him to just let it go.” PRH responded: “Thank you, Bob! Will look out for Melissa’s email and it would be hugely helpful if you were able to convince AC [Andrew Cuomo] to release material tomorrow!”⁶⁹

July 15

At around 2:30 p.m. on July 15, PRH sent Barnett “the contract for Governor Andrew Cuomo.” The email from PRH states: “Please note that given the highly compressed schedule required to publish in October we have inserted a manuscript delivery due date of this Friday, July 17. Our hope is that the Governor will be comfortable with sharing either the whole manuscript, or at least a portion thereof, in advance of that date.”⁷⁰

The contract attached to PRH’s email to Barnett contained several pieces of information relevant to whether the Book complied with the nine factors JCOPE set out in its Advisory Opinions. For example, the contract required Governor Cuomo to deliver to PRH “a new and original manuscript . . . containing approximately 80,000 words.” It also stated: “The Author shall deliver to Publisher on or before July 17, 2020, one copy of the complete Work . . . satisfactory to Publisher in style, content, length and form.” It further provided that “[a]ll details of the advertising and promotion of the Work shall be determined by Publisher” and that “[i]f Publisher requests the Author’s cooperation in promoting the Work, the Author shall be reasonably available for such promotional activities on a mutually agreeable schedule.” The contract’s description of the Book was much more detailed, and contained different information than what was included in the July 10 Request to JCOPE; it stated that “[t]he Work shall be a nonfiction work that provides leadership lessons during crisis and a behind-the-scenes account of the Author’s experiences during the Pandemic, including his interactions with health, federal, and other officials. Additionally, it shall include the Author’s candid observations about the federal government’s management of the crisis as well as a plan for what America needs to do to protect itself going forward.”⁷¹ In contrast, the July 10 Request did not even reference COVID-19.

⁶⁷ Ex. 57 (PRH_JCOPE_00017653).

⁶⁸ Ex. 58 (OGNYS-JCOPE-COVID-00050281).

⁶⁹ Ex. 59 (PRH_JCOPE_00017656-57).

⁷⁰ Ex. 60 (PRH_JCOPE_00000006).

⁷¹ Ex. 61 (PRH_JCOPE_00000009-32).

July 16

At 1:30 p.m. on Thursday, July 16 – before JCOPE provided its conditional approval of the Book – DeRosa promised PRH that “you will have a draft by 5pm tonight.”⁷²

At around 2:00 p.m., Levine asked Stamm to call him and that “Mike wants to talk at 5.” Stamm responded asking Levine to schedule the call for earlier.⁷³

In the early evening, Marvin Jacob sent an email to Weissman, Lavine, and Yates with the subject “Delegation of Authority/Chamber Request”:

I have focused on “delegation” as Mike Rozen, in effect, insists that we as Commissioners are powerless once Staff acts pursuant to its long ago granted “delegated authority”. In the current context Mike, as chair, without a vote of a majority of Commissioners, has instructed Staff to act pursuant to delegated authority granted at the outset of this Commission’s existence, despite George’s request for additional information before action is taken on the Governor’s request. I don’t have a copy of said Delegation; nor have I read it recently. However, as Section 16 makes clear, Opinions are rendered by the Commission not by Staff. The Executive Director pursuant to delegated authority may step into the Commission’s shoes under Section 94- 9(a) which provides that the Commission may delegate authority to the “Executive Director”, not to Staff or any member thereof. Only the ED may act in the name of the Commission, according to that provision. That provision means exactly what it says. And, as you know, we have no ED. Here’s my suggestion: a letter signed by us should be sent to Mike, cc: the other Commissioners, stating in effect that any actions taken by Staff to effectuate the Opinion it has rendered to the Governor are ultra vires, and that any further consideration of this matter be done on vote of the Commission only, as there is no ED to implement the authority heretofore delegated. Most important perhaps, the fact that the requests of Commissioner Weissman for information relevant to the Chamber Request are simply ignored and overridden by the Chair, who by law has one vote as do we all, is unprecedented in the affairs of this Commission and offends our traditional governance practices. I’d appreciate your views.⁷⁴

At 5:45 p.m., Mogul sent JCOPE the PRH letter containing the language drafted by Barnett confirming that the terms of the publishing contract for the Book were “usual and customary.”⁷⁵

Mogul wrote in her August 19, 2020 memorandum to file that she had a conversation with Levine on July 16 where she “conveyed the additional information Mr. Levine had requested before final approval, including and that the Governor had agreed to record an audio book and to do 10 media

⁷² Ex. 62 (PRH_JCOPE_00002386–88).

⁷³ Ex. 63 (NYJCOPE00001331).

⁷⁴ Ex. 64 (NYJCOPE00001349).

⁷⁵ Ex. 65 (OGNYS-JCOPE-COVID-00024442–43).

appearances within a 60-day window of the book’s publication.”⁷⁶ Levine recalled that Mogul also provided certain details concerning the Governor’s compensation for the Book during that call, including that there would be an advance of no less than around \$5.5 million, plus royalties. He also recalled that Mogul indicated the Governor would be required to make ten public appearances within a certain number of days of the date of publication for marketing purposes. Mogul provided this information to Levine pursuant to their agreement that Levine and Rozen would not share the information with the rest of the Commission.

At 5:51 p.m., Levine emailed Mogul: “Per our conversation, JCOPE staff has approved the Governor’s Outside Activity request. As discussed, the formal approval letter will be sent to your attention tomorrow.”⁷⁷ Mogul stated in her August 19, 2020 memorandum to file that “[i]t is my impression that Mr. Levine was consulting with the JCOPE Chair in addition to other members of the Staff throughout the process and before providing that approval.”⁷⁸

A few minutes later, DeRosa sent an email to PRH, copying Barnett: “Just received official approval – uploading now.”⁷⁹ A few minutes later, PRH received, through its web-based document sharing platform, the executed contract electronically signed by Governor Cuomo.⁸⁰

At 5:55 p.m., Levine texted Stamm a draft message to be sent to Rozen, asking “This work?”: “Mike - as we discussed, I just sent the approval email (attached) to the Chamber. The formal letter will go out tomorrow.” Stamm approved the message to Rozen,⁸¹ which Levine sent later that night.⁸²

At 5:58 p.m., DeRosa emailed PRH, copying Barnett, confirming that the manuscript of the Book was transmitted to PRH through its secure transfer system, and that the contract was signed: “The document has successfully uploading and the contract has been signed. It’s about 70K words at this point – it’s still rough and he’s still writing/adding color and stories but for the meantime, it’s all yours!”⁸³ Therefore, the manuscript was delivered prior to the July 17 deadline in the contract.⁸⁴

July 17

At 9:32 a.m., Levine texted Stamm: “Obviously nothing was sent to the comms [commissioners] last night. Ugh.” Stamm responded: “At least you sent him the email. I’d do the same with the

⁷⁶ Ex. 24 (August 19, 2020 Mogul memorandum).

⁷⁷ Ex. 66 (OGNYS-JCOPE-COVID-00024440).

⁷⁸ Ex. 24 (August 19, 2020 Mogul memorandum).

⁷⁹ Ex. 67 (PRH_JCOPE_00017682).

⁸⁰ Ex. 68 (PRH_JCOPE_00000439-65).

⁸¹ Ex. 69 (NYJCOPE00001332).

⁸² Ex. 70 (NYJCOPE00000651).

⁸³ Ex. 71 (PRH_JCOPE_00017695).

⁸⁴ Ex. 68 (PRH_JCOPE_00000439-65).

letter. You could push him to respond before you send the letter. I don't know what I would do." Levine responded: "I don't think it matters. I sent the email to Judy last night. Either way I'll worry about it once the letter is ready. Mike Sande has edits that I have to review."⁸⁵

At 2:47 p.m., Levine sent Mogul "the approval letter for the Governor's Outside Activity request." The attached letter was signed by Levine only, and was directed to Mogul. It stated:

On behalf of the staff of the New York State Joint Commission on Public Ethics (the "Commission"), I am responding to the request dated July 10, 2020, that you submitted on behalf of Governor Andrew M. Cuomo, for review and approval to author "a continuation of his last book, *All Things Possible: Setbacks and Success in Politics and Life*." Based on the information you provided. Commission staff has **granted** your request for approval of the proposed outside activity, provided the conditions discussed below are met.

The letter proceeds to list the nine requirements (recited in Legal Background Section II, *supra*) "drawn from Advisory Opinions issued by the Commission's predecessor agency." It further stated:

Based on the representations in your request for approval of this outside activity, it appears that the above requirements will be satisfied. Please note that the Governor may not promote the book while performing official duties, and any appearances or activities to promote the book must clearly be separate and apart from the Governor's official duties. Importantly, as previously determined by the Commission in approving the 2012 request for the Governor's first book, reflections by the Governor on his personal history and life experience are not considered "part of his . . . official duties[]" under the third requirement. *See* Advisory Opinion 98-15 at 6; 2012 Ltr. to Agata at 2. Thus, in line with the 2012 determination, and in light of the representations in this most recent request, "the presence in the book of material or knowledge acquired by the Governor in the course of performing his official responsibilities would not violate the third requirement." 2012 Agata Ltr. at 2.⁸⁶

A few minutes later, Levine texted Stamm, "[l]etter is out."⁸⁷

Meanwhile, Commissioners Weissman, Jacob, Lavine and Yates continued discussing amongst themselves the propriety of the delegation of authority to the Executive Director.⁸⁸ For example, early in the morning on Friday, July 17, Weissman responded to Marvin Jacob's email from the prior evening:

⁸⁵ Ex. 72 (NYJCOPE00001334).

⁸⁶ Ex. 73 (OGNYS-JCOPE-COVID-00024452-55).

⁸⁷ Ex. 74 (NYJCOPE00001335).

⁸⁸ Ex. 75 (NYJCOPE00001358); Ex. 76 (NYJCOPE00001367); Ex. 77 (NYJCOPE00001346); Ex. 78 (NYJCOPE00001350).

I believe in June 2019 (or thereabouts) the Commission, in view of Seth's departure, acted at Mike's request to delegate the ED's responsibilities to Monica, effectively making her acting ED. I raised the issue that this would create the appearance that Monica, already an expressed candidate for ED, was the Commission's preferred choice. In response to that issue Martin was made co-acting ED. Examining the minutes from last year needs to be undertaken. I will review my meeting minutes and let all know how this was reported. You may be able to do the same, depending on your location and that of the minutes from the meeting. More difficult will be tracking down the delegation from early 2012. My recollection is that it was discussed, revised and ultimately approved by the Commission. I am reasonably sure I have the minutes from those meetings and the delegation that was adopted. However, it resides in one of five boxes in storage. I will spend this morning attempting to track down that information and will share the results of the search. Also, I plan to call Mike today and find out whether he is going to respond to the request of the outside Activity Activity [sic] Approval form.⁸⁹

Weissman's comment about reaching out to Rozen regarding the Outside Activity Approval Form reflects that he was unaware on the morning of July 17 that Levine had already told Mogul on July 16 that JCOPE staff had approved the July 10 Request and would be sending the formal approval letter that afternoon.

III. July 17 – November 2020: JCOPE Commissioners Continue to Question the Delegation of Authority to Staff to Approve the Book, as Governor Cuomo Completes and Publishes the Book

On July 21, Chairman Rozen responded to Weissman's July 14 email where Weissman reiterated his concerns regarding Governor Cuomo's request to approve the Book and the need, in his view, to obtain additional information. Rozen responded as follows:

Thank you for your email. I appreciate the concerns you've raised and in no way intend to minimize them. That said, we received representations that the publisher has no state business or lobbying activity, and found nothing to contradict this or or [sic] otherwise suggest any sort of conflict. (I note that JCOPE guidance or approval is always conditioned on the accuracy of representations made.) Consistent with the delegation of the Executive Director's authority to to [sic] Monica and Martin, I directed Martin to convey the staff's approval of the outside activity.

Neither I nor staff believe that a prior agreement with a different publisher many years ago is relevant to the present question. And, as regards any legal representative or agent the Governor uses, he does not need our permission or approval to hire such person or firm; rather, the Governor must abide by a recusal plan should the person or firm have business before him. Regarding the proposed contract with the publisher, the Chamber expressed

⁸⁹ Ex. 75 (NYJCOPE00001358).

significant concerns about information being released without authorization if shared with the entire Commission. As a result, I suggested, and the Chamber agreed, that they share the key terms, i.e., financial benefits and obligations, with me and Martin on the condition that such information would not be not distributed further. That said, I will have staff convey your request to the Chamber for a copy of the agreement after it is ultimately executed.

Per your request, I have attached the following documents: (1) the request letter that the Chamber submitted on July 10, 2020; (2) JCOPE's approval, dated July 17, 2020; and (3) JCOPE's prior approval, dated December 28, 2012. Staff informs me that no form is necessary when all the required information is in the request letter – the form is simply a tool to obtain the information already provided in the request.⁹⁰

Yates replied to Rozen's response to Weissman, addressing his message to Rozen:

I'm writing this to you and not the entire Commission. (1) I take no position on Cuomo writing the book.. I don't have enough information and it could be that deferring to staff is ok. I don't care. (2). BUT, I have expressed deep concern about being "jammed"...What is the rush here? Why is this being spring on us at the last minute? Why can't we have a discussion about it.? (3). AND, now I'm more concerned than ever, to learn that the Chamber shared secret information with you. I say this from personal experience and because I presume to consider you a friend and respect the way you handle a difficult job. I had many, many encounters with the Governor where he "sprung" things on us and relied on our "private" conversations. Most of these encounters never really required secrecy nor speed. It was just a way of trapping people into a position so that, later, he could say "you approved this", or "you agreed". even though there never was a full analysis, discussion or opportunity to disagree. From a commission point of view, I don't think it's proper for you to have information imparted by an applicant, pertinent to a Commission decision, that is not available to all. From a personal point of view: I think you are allowing the Chamber to put you in an untenable position that you may regret.⁹¹

Rozen responded to Yates: "I take everything you say quite seriously and intend to discuss this matter further with everyone in our next executive session."⁹²

As discussed in further detail above, the Commission proceeded to deliberate on the delegation of authority to staff to approve outside activity requests, like the Book, in Commission meetings. See Legal Background Section III, *supra*. See also Ex. 16 (October 27, 2020 Meeting Minutes); Ex. 15 (November 17, 2020 Meeting Transcript).

⁹⁰ Ex. 52 (NYJCOPE00001371).

⁹¹ *Id.*

⁹² *Id.*

The JCOPE Notice describes Governor Cuomo’s “[e]xtensive reliance on state employees in [his] push to finalize the book,” including meetings in Albany between the editors from PRH, the Governor and State employees.⁹³ Governor Cuomo’s and his staff’s efforts to complete work on the Book, including the audiobook and promotional campaign, are described in detail in the JCOPE Notice.

On August 18, PRH announced that Crown, an imprint of the Random House Publishing Group, would publish the Book on October 13, describing the book as a “revealing, behind-the-scenes account of his experience leading New York State through the COVID-19 epidemic.”⁹⁴ The Amazon.com description of the 320-page Book states that “Governor Andrew Cuomo tells the riveting story of how he took charge in the fight against COVID-19 as New York became the epicenter of the pandemic,” and provides “a dramatic, day-by-day account of the catastrophe as it unfolded.” Specifically, the Book details the Governor’s pandemic response between March 1 and June 19, 2020.

ANALYSIS

Based on the foregoing investigative findings, and an analysis of the applicable laws and regulations, Hogan Lovells has reached the following conclusions regarding JCOPE’s July 17, 2020 conditional approval of the Book.

I. JCOPE’s Practice of Allowing the Executive Director to Approve Requests for Outside Employment Without a Commission Vote Was Duly Authorized

Pursuant to Executive Law § 94(9)(a), JCOPE is authorized to “delegate authority to the executive director to act in the name of the commission between meetings of the commission provided such delegation is in writing, the specific powers to be delegated are enumerated, and the commission shall not delegate any decisions specified in this section that require a vote of the commission.” Based on that delegation authority, JCOPE passed Resolution 12-02, which in paragraph 16 authorized the Executive Director of JCOPE “[p]ursuant to Executive Law §94(16) and Legislative Law §1-d(f), to issue informal letter opinions when the response to an inquiry is based solely on Commission precedent.”

Executive Law § 94 does not state whether a Commission vote on outside activity requests is required. It is clear, however, that a Commission vote is required for certain other acts, such as approving an Executive Director and commencing a substantial basis investigation. *See* Legal Background Section II, *supra*. Because there is no requirement that outside activity requests be voted on by the Commission, JCOPE was permitted under Executive Law § 94(9)(a) to delegate authority to the Executive Director to respond to outside activity requests.

⁹³ JCOPE Notice at 16-17.

⁹⁴ Ex. 79 (<https://global.penguinrandomhouse.com/announcements/crown-to-publish-ny-governor-andrew-cuomos-american-crisis-leadership-lessons-from-the-covid-19-pandemic-october-13/>).

The Executive Director acted within the scope of the delegated authority in issuing the July 17 letter providing conditional approval of the July 10 Request. The July 17 letter was the kind of informal letter opinion authorized by Resolution 12-02—it makes clear in the first sentence that it was issued on behalf of JCOPE’s “staff” and is distinct from the formal advisory opinions that JCOPE publishes on its website, which are longer and more closely resemble a court decision.⁹⁵ And given that JCOPE already issued advisory opinions concerning state officials seeking compensation for publishing books, JCOPE staff could respond to Governor Cuomo’s request based solely on Commission precedent.

By the summer of 2020, it was consistent practice for JCOPE staff to respond to outside activity requests that could be decided based on precedent. Indeed, the staff and Commissioners we interviewed could not recall any Commission votes on outside activity requests. Thus, it was not out of the ordinary for JCOPE staff to respond to the July 10 Request without a Commission vote. Over the years, it became consistent practice for JCOPE staff to bring high profile matters to the attention of the Commission, even if no Commission vote was required.⁹⁶ Accordingly, on July 11, 2020, Levine sent an email to all Commissioners providing notice of Governor Cuomo’s July 10 outside activity request.⁹⁷

Some Commissioners have stated that they were not fully aware of the extent to which JCOPE staff was deciding outside activity requests. But the Commissioners delegated that authority to their staff and either were, or should have been, aware that staff handled such requests. And when Levine notified the Commissioners on July 11 that staff intended to approve the July 10 Request that coming Monday (July 13), none of the Commissioners responded questioning staff’s authority to do so. In a July 13 email to Rozen, copying several other Commissioners, Weissman referred to the fact that “the Governor’s first book deal was approved by Commission staff,” indicating he was aware that staff handled similar requests in the past. Yates responded to that email stating that he was not “opining on whether staff approval is right or wrong,” but felt the request was being rushed through.⁹⁸

Some Commissioners have also argued in retrospect that the decision on how to respond to the July 10 Request should have been submitted to the full Commission once Stamm recused herself, because Levine was never authorized to act as Executive Director on his own. However, given that there were no rules addressing how one co-Executive Director should proceed if the other was recused, there is no basis to fault Levine for not submitting the July 10 Request to the Commission; he was under no requirement to do so. In any event, there is no indication such arguments were articulated during the pendency of the July 10 Request.

⁹⁵ Ex. 73 (OGNYS-JCOPE-COVID-00024452–55).

⁹⁶ See Ex. 16 (October 27, 2020 Commission meeting minutes) at 5-6.

⁹⁷ Ex. 35 (NYJCOPE00001354).

⁹⁸ Ex. 44 (NYJCOPE00001369).

II. The Approval of the Book Was Improper for Other Reasons

A. JCOPE Disregarded Potential Ethical Issues Arising From Governor Cuomo Contemporaneously Writing and Commercializing a Book About His Handling of the COVID-19 Pandemic

The primary argument presented in the July 10 Request letter was set forth in its first paragraph: “Inasmuch as this book will be a continuation of his last book, *All Things Possible: Setbacks and Success in Politics and Life*, which JCOPE approved on December 28, 2012, his authoring of the book which is the subject of this request is also consistent with the Public Officers Law and should be approved.” The letter proceeded to recite the nine factors that must be satisfied for a state official to be compensated for publishing a book based on JCOPE precedent. The July 10 Request stated: “[i]n granting the Governor’s 2012 request for outside activity approval to author his prior book, JCOPE . . . approved the Governor authoring a memoir for commercial publication based on” those factors. The July 10 Request specifically called attention to the portion of JCOPE’s approval of the Governor’s prior book that relates to the third factor:

with respect to the third factor, that the “subject matter is sufficiently unrelated to the individual’s job responsibilities so that authorship, advice, or material provided in the book could not be viewed as part of his official position,” JCOPE specifically noted that “the presence in the book of material or knowledge acquired by the Governor in the course of performing his official responsibilities would not violate” this requirement.⁹⁹

On July 11, Levine notified the Commissioners of the July 10 Request by email. His email stated: “[a]s represented to us, the Governor would author a memoir that is a continuation of his 2014 book.” His email included an asterisk next to the third factor, stating: “The Commission’s previous evaluation of a book contract in 2012 noted that ‘the presence in the book of material or knowledge acquired by the Governor in the course of performing his official responsibilities’ is consistent with this third factor.” Levine’s email proceeded to state that the Executive Chamber “has represented to us that the Governor’s planned activity allows him to stay within the bounds created by the nine factors,” that JCOPE staff “looked extensively into” the publisher’s corporate ownership for potential conflicts, and that “[b]ased on staff’s analysis, we do not see a reason to deny the request (again, any approval would be conditional, subject to the final terms), and are inclined to communicate this to the Chamber by close of business Monday.”¹⁰⁰

Levine’s July 11 email reflects clearly that JCOPE staff accepted as true the Governor’s representation that the Book would be a continuation of his prior book, without taking steps to verify that and while disregarding indications to the contrary. The email also reflects that JCOPE staff’s reliance on that representation was central to their conclusion that there was no reason to deny the request. That is evident from the references in the July 11 email to JCOPE’s approval of

⁹⁹ Ex. 31 (OGNYS-JCOPE-COVID-00024076-24084).

¹⁰⁰ Ex. 35 (NYJCOPE00001354).

the Governor's 2012 request to author his prior book, including the same excerpt from the prior approval concerning the third factor highlighted in the July 10 Request. JCOPE staff thus agreed with and adopted the Executive Chamber's rationale in the July 10 Request that because the Book was purportedly a continuation of the prior book – which was approved (at least in part) on the basis that featuring knowledge the Governor acquired in the course of performing his official responsibilities did not violate the third factor – this Book should likewise be approved.

Nevertheless, the subject matter of the Book was in fact substantially different from the subject matter of Governor Cuomo's prior Book. Thus, JCOPE staff's reliance in the July 17 letter on JCOPE precedent approving Governor Cuomo's prior book was misplaced and unfortunate. While the July 10 Request did not indicate the Book would be focused on the Governor's response to the COVID-19 pandemic, or even mention COVID-19, the Book ultimately was a day-by-day account of the Governor's handling of the pandemic response. In that regard, the July 10 Request was plainly misleading. But JCOPE staff had sufficient information to know better than to rely on the Governor's representations.

For example, according to a memorandum prepared by Mogul, she told Levine on July 10 that the Book would focus on the response to COVID-19.¹⁰¹ While Levine did not recall whether Mogul told him, he generally recalled being aware that the Book would, at least in part, cover the Governor's response to COVID-19. Also on July 10, St. John emailed Levine and other JCOPE staff that Governor Cuomo was on the radio discussing his forthcoming book about New York's response to COVID-19, and Bliss raised concerns that this might indicate a possible violation of the factor concerning promotional activities.¹⁰² The transcript of the Governor's radio appearance that day was published online. In the interview, the Governor stated: "I am now thinking about writing a book about what we went through, lessons learned, the entire experience because if we don't learn from this then it will really compound the whole crisis that we've gone through."¹⁰³ Thus, JCOPE was on notice that the Book was not a mere continuation of Governor Cuomo's prior book. Importantly, Levine recalled the Executive Chamber telling him that the anticipated timeframe for publication of the Book was the fall of 2020, sufficiently ahead of the presidential election.

The fact that the Governor sought to commercialize his leadership during the COVID-19 pandemic should have raised serious concerns among JCOPE staff regarding potential ethical/conflict of interest issues. One JCOPE staff member acknowledged that had JCOPE known that the Book would be focused on the Governor's official duties in connection with the COVID-19 pandemic, that would have sparked an entirely different discussion within the office, as it would have presented the potential for a clear ethical violation. As set out above, however, JCOPE staff did know that the Book would at least in part focus on that subject, and would be written *while* the Governor was in the midst of leading the State's pandemic response.

¹⁰¹ Ex. 24 (August 19, 2020 Mogul memorandum).

¹⁰² Ex. 32 (NYJCOPE00000201).

¹⁰³ Ex. 80 (July 10, 2020 Chartock interview of Governor Cuomo).

Specifically, JCOPE staff failed to identify and conduct further diligence on at least two potential ethical issues. *First*, the Governor requested approval to enter into a contract with a publisher to sell the material he was in the process of creating in real time through his actions and policies. This arrangement created, at a minimum, the appearance of a financial incentive for the Governor to generate content that would serve his Book and publishing contract. *Second*, given that the Governor was busy leading the State's pandemic response and attending to his many other responsibilities, there was a substantial possibility that he would use state resources in order to complete the Book so that it could be published in the fall.

JCOPE staff rationalized the approval of the Governor's request on the basis that the third of the nine factors was construed through JCOPE Advisory Opinions to authorize a governor to publish a book for compensation on any subject matter, provided that the official would not be publishing content created as part of his or her official responsibilities (i.e. a governor earning money from publishing State of the State addresses). That interpretation effectively renders the third factor moot. The Governor's Book seems to be exactly the type of publication that the third factor was designed to prohibit. In any event, once JCOPE staff became aware that the book would be focused on COVID-19, it should have been clear that it presented potential ethical issues that needed to be investigated further. JCOPE staff also accepted the Executive Chamber's representations that the Governor would comply with the nine factors, including that he would not use state resources on the Book, without any further inquiry.

Even though the blame for the misleading and insufficient application for approval of outside activity lies squarely on the Governor's doorstep, JCOPE collectively bears some responsibility for approving the July 10 Request. JCOPE staff failed to identify the potential ethical issues arising from the Governor entering a contract to publish a book about his leadership during the COVID-19 pandemic. Moreover, JCOPE staff failed to engage in critical analysis of the request and ignored red flags that should have prompted further due diligence. Most of the Commissioners stood by while JCOPE staff approved the request. The few Commissioners who raised concerns sent emails to JCOPE staff and Rozen requesting the publishing contract and other information, and decrying that the request was being rushed or jammed through. They likely could have done more to intervene, such as insist that JCOPE staff not respond to the request until the next Commission meeting.

B. JCOPE's Diligence on the July 10 Request Was Inadequate

To be clear, JCOPE is under no obligation to conduct rigorous due diligence to test whether representations in outside activity requests are accurate. Nonetheless, it is clear from the documentary record and our interviews that JCOPE staff did conduct diligence on whether the Governor publishing through PRH posed any conflict. JCOPE staff conducted that additional due diligence in large part because of a controversy that arose in connection with the Governor's prior book contract with HarperCollins, whose parent company, News Corporation, had lobbied the

Governor’s office and tax department. Thus, while JCOPE staff’s ordinary practice is to accept representations in outside activity request letters as true, and make any approval of the requests expressly conditional on those representations being true, JCOPE staff has conducted additional due diligence where there is a reason to do so.

Here, there was very good reason for JCOPE staff to conduct further diligence. As noted above, the fact that the Executive Chamber omitted from the request letter that the Book would be focused on the State’s COVID-19 response should have put JCOPE staff on alert. Further, it strains credulity that Governor Cuomo could write a book about the State’s response to the COVID-19 pandemic – and publish it just a few months later in the fall – without receiving substantial assistance from others in that effort. JCOPE staff should have inquired further as to the extent to which the Book would focus on the pandemic response, how long the manuscript had to be (and when it would be due), and who would be assisting the Governor with the Book, including whether State personnel would be involved, in violation of the second of the nine factors. Instead, JCOPE staff blithely accepted the Governor’s representation that the Book would not involve State personnel as true, without probing the issue further with the Executive Chamber.

Not only did JCOPE staff not pursue this information, but as set forth further below, they also failed to obtain the publishing contract despite the requests from certain Commissioners, and failed to obtain information the Governor was required to submit to JCOPE as part of a standard outside activity request form. The record reflects that JCOPE staff members were determined to expedite the approval of the July 10 Request, per the Executive Chamber’s demands. Stamm’s July 10 text message exchange with another JCOPE staff member, Walter McClure, where she effectively adopted his characterization of the Governor’s request as a “fire drill,” is emblematic.¹⁰⁴ In reality, the only urgency was caused by the Governor choosing to wait until he was in the midst of finalizing his multi-million dollar publishing contract – and just a week before the manuscript was due – to request JCOPE approval for a book he already began substantial work on in early June.

i. JCOPE’s Staff Disregarded the Commissioners’ Requests for Further Information, Including the Contract With the Publisher, Before Approving the Book

JCOPE staff failed to obtain a copy of the publishing contract for the Book after Commissioner Weissman requested it.¹⁰⁵ Instead of insisting to see the contract, Levine and Rozen settled for a high-level description of some of its terms (on the condition that they would not share that information with the rest of the Commission), and a letter from PRH (dictated verbatim by Governor Cuomo’s literary agent) that the contract’s terms were “usual and customary.”¹⁰⁶ They agreed to this as a compromise based on their understanding that the Governor would not have agreed to provide the contract to the entire Commission due to his concern that it might be leaked. The Executive Chamber’s concerns about JCOPE’s historical protection of confidentiality were

¹⁰⁴ Ex. 33 (NYJCOPE00001326).

¹⁰⁵ Ex. 43 (NYJCOPE00001361).

¹⁰⁶ See Investigation Findings Section II, *supra*.

not unfounded. Notwithstanding whether the Governor had legitimate reason to believe that the publishing contract would be leaked to the media or other third parties if he provided it to the entire Commission, an agency tasked with being an ethics watchdog should not have allowed the Governor to dictate what information would be made available. And while Commissioners should not be cut off from information supplied to other Commissioners or staff, Commissioners also have a responsibility to maintain the confidentiality of information they receive in connection with their work on behalf of JCOPE. Nevertheless, lack of confidence in JCOPE's ability to maintain the confidentiality of information received was a core problem in this process and severely undermined JCOPE's ability to do its job effectively.

If JCOPE obtained the contract before approving the Book, JCOPE would have learned that: (1) Governor Cuomo was required to deliver an approximately 80,000 word manuscript just seven days after the July 10 Request, which means that the Governor must have made substantial progress on the Book before even requesting prior approval from JCOPE; (2) that Governor Cuomo's responsibilities in promoting the Book could interfere with his responsibilities as the Governor during an unprecedented pandemic; (3) that the Book would be focused on the State's response to COVID-19, making it much more likely to require the assistance of Governor Cuomo's staff and other State personnel than if it were merely a memoir, particularly given the imminent deadline for the manuscript; and (4) that the Governor could earn over \$5 million from the Book, creating a significant financial incentive that might not be aligned with his official responsibilities. It is quite plausible that JCOPE staff would not have approved the July 10 Request if they had all of this information.

ii. JCOPE Never Requested Nor Received a Request Form for the Book, or Certain Information Required By That Form

Pursuant to 19 NYCRR 932.6(c), “[a] head of a State Agency or Statewide Elected Official who requires Commission approval pursuant to Part 932.5(b) shall submit to the Commission a request on the outside Activity Approval Form” and “[t]he Commission will not consider requests without a completed Outside Activity Approval Form.” It is clear that Governor Cuomo required Commission approval of the Book, and therefore was required to submit the approval form. Although Mogul's July 10 Request letter indicated the Governor would be willing to submit the form, if required,¹⁰⁷ Chairman Rozen stated in an email on July 21 that staff had advised him that no form is necessary when all the required information is in the request letter.¹⁰⁸ Accordingly, Governor Cuomo was never asked to submit the approval form, and never did so. That would not be a problem in and of itself, but JCOPE staff never followed up with the Executive Chamber requesting that they provide to JCOPE all of the information required by the Outside Activity Approval Form.

The approval form requires the identification of “[t]he number of hours of work per week, as well as the times and days when the work will be performed.”¹⁰⁹ There is no indication that Governor

¹⁰⁷ Ex. 31 (OGNYS-JCOPE-COVID-00024076-24084).

¹⁰⁸ Ex. 52 (NYJCOPE00001371).

¹⁰⁹ Ex. 11 (JCOPE Outside Activity Approval Form).

Cuomo or his staff ever provided that information to JCOPE or that JCOPE asked for that information. On the contrary, not only did Governor Cuomo fail to provide any estimate of how much time he would spend on the Book going forward, but he also failed to disclose that he and his staff substantially completed a draft of the Book by as early as July 1,¹¹⁰ instead misleadingly stating in the July 10 Request that he “is seeking to author a book in the very near future.”¹¹¹ This is a significant mischaracterization, because Governor Cuomo was in the midst of responding to an unprecedented public health crisis. Had he reported to JCOPE that he would be spending substantial time on the Book over the next few months, that would have raised significant concerns that the Book would necessarily require assistance from Governor Cuomo’s staff and other state personnel, in violation of the second of the nine factors.

The approval form also requires “[a]n explanation as to why the outside activity does not present a conflict with your State job responsibilities.”¹¹² This requirement corresponds directly with JCOPE’s nine factors, and in particular, the third factor. However, Governor Cuomo and his staff never provided any such explanation, apart from Section II of the July 10 Request which asserts: “There is No Conflict or Appearance of Conflict from this Outside Business Relationship Because None of the Two Potential Publishers is an Interested Source.”¹¹³ But the July 10 Request does not even reference COVID-19, let alone offer any explanation as to why the Governor writing a book about his handling of the COVID-19 pandemic while at the same time leading the State’s COVID-19 response did not create a conflict or an appearance of a conflict.

CONCLUSIONS AND RECOMMENDATIONS

Governor Cuomo is at fault for misleading JCOPE through the Executive Chamber’s July 10 Request on his behalf, which falsely suggested all work on the Book was prospective and mischaracterized the subject matter of the Book as a continuation of his prior memoir. Nevertheless, JCOPE staff members were on notice as of July 10 that the Book would be focused, at least in part, on COVID-19. JCOPE should have recognized the potential ethical issues arising from the Governor entering a contract to publish a book about his leadership during the pandemic, including that the arrangement could create perverse financial incentives or the appearance of such incentives, and that there was a strong possibility the Governor would need to use state resources in order to complete the Book in time to be published in the fall. Accordingly, JCOPE staff should have conducted further due diligence to probe whether the outside activity would run afoul of the ethics rules. Instead, JCOPE staff accepted the Executive Chamber’s representations as true, and accepted the Executive Chamber’s refusal to provide the publishing contract requested by certain Commissioners. There were numerous questions that should have been asked prior to approving the July 10 Request, but were not. Between July 10 and July 17, JCOPE staff rushed to approve the Governor’s request, and gave short shrift to the Commissioners who raised concerns. Indeed,

¹¹⁰ See Ex. 21 (PRH_JCOPE_00002346).

¹¹¹ Ex. 31 (OGNYS-JCOPE-COVID-00024076-24084).

¹¹² Ex. 11 (JCOPE Outside Activity Approval Form).

¹¹³ Ex. 31 (OGNYS-JCOPE-COVID-00024076-24084).

the Executive Chamber apparently would not have provided any information concerning the publishing contract had Rozen and Levine not agreed to keep that information confidential, including from the very Commissioners who requested that information.

With the understanding that JCOPE will soon be disbanded, Hogan Lovells recommends the following practices be adopted by its successor agency:

1. The successor agency should require any outside activity request by a statewide officeholder to be decided by a vote of the Commissioners;
2. To the extent the successor agency identifies any misrepresentations or inconsistent information in an outside activity request before providing a response to the request, the successor agency should be required to conduct further due diligence concerning those misrepresentations or inconsistencies, and the applicant should be required to provide an explanation of the misrepresentations or clarify the inconsistencies;
3. The successor agency should document in writing the roles and responsibilities of its Executive Director and staff, and document in writing the procedures that should be followed in the event there is a vacancy in the Executive Director role;
4. To the extent the successor agency wishes to delegate authority to its Executive Director and/or staff to approve certain outside activity requests (other than requests by statewide officials, which should be decided by the full Commission), the successor agency should delineate the scope of the delegated authority in writing, including how the Executive Director and/or staff should respond to requests for information or documents from Commissioners;
5. The successor agency should create a list of information and documents that must be provided in connection with all outside activity requests, including the information on JCOPE's Outside Activity Approval Form and the underlying contract for the outside employment (including, but not limited to, the amount of compensation);
6. The successor agency should establish a standard waiting period for the approval of outside activity requests. The successor agency should also set forth the grounds on which an outside activity request may be expedited so that only requests that deserve to be expedited are expedited, with the onus on the requesting party to establish that his or her request should be expedited. The successor agency should also develop and document procedures that should be followed in connection with expedited outside activity requests;
7. The successor agency should adopt a rule requiring that any information provided by any party requesting approval from the agency in connection with such request must be shared with all voting members of the agency;

8. The successor agency should adopt and strongly enforce rules restricting its members from disclosing confidential information provided to them, as breaches of confidentiality may undermine the agency's ability to do its job;
9. If multiple individuals are appointed as co-Executive Directors, the successor agency should document in writing how the co-Executive Directors should operate, including in the event one of the co-Executive Directors recuses himself or herself; and
10. The successor agency should adopt specific guidelines and procedures concerning recusal when employees of the agency believe they are potentially conflicted.

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